TAN FOO SU v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) February 25, 1967]

[Raub — Criminal Appeal No. 8 of 1966]

Penal Code s. 379 — Theft — Material witness not called by prosecution or defence — No application made for adjournment to produce witness — Adverse inference.

Criminal Law and Procedure — Material witness not called — Adjournment — Discretion of court — Criminal Procedure Code (Cap. 6) s. 259(i).

Criminal Law and Procedure — Defence — Duty of court to consider defence story — No duty on accused to prove his innocence.

Evidence — Presumption — Evidence Ordinance, 1950, s. 114(g).

The appellant was convicted of the offence of theft of some wooden beams and fined a sum of $300, in default three months' imprisonment. The appellant gave evidence on oath at the trial to the effect that the beams were given to him by a contractor named *K.A.* and that he did not steal them from the complainant. In cross-examination he said that *K.A.* had no land near his place and that he took the said beams from the side of a bridge. *K.A.* was not called as a defence witness and there was no mention in the record that the appellant had asked for an adjournment in order to call that witness.

Held: (1) the circumstances of this case warranted an adjournment so that the witness named by the appellant could be called;

(2) failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection.

Cases referred to:—

(1) *R.* v. *Virasami* (1896), I.L.R. 19 Mad. 375.

(2) *Goh Ah Yew* v. *Public Prosecutor* [1949] M.L.J. 153.

(3) *Abu Bakar* v. *R.* [1963] M.L.J. 288.

MAGISTRATE'S CRIMINAL APPEAL.

Loo Sim Soo (Miss) for the appellant.

Abdullah bin Ghazali (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J. (delivering oral judgment): The appellant was convicted of the offence of theft of 21 old wooden beams to the value of $10.50 belonging to one Abdullah bin Mukim Mat, an offence under section 379 of the Penal Code. He was found guilty and convicted, and fined a sum of $300, in default three months imprisonment. The facts are as follows: the complainant found that 21 old wooden beams which he had placed on his land were missing and the missing beams were subsequently traced to the appellant, in the circumstances which *prima facie* established an offence under section 379 of the Penal Code.

There are two grounds of appeal. Firstly, that the learned trial magistrate erred in law in not exercising his discretion under section 259(i) of the Criminal Procedure Code (Cap. 6) in adjourning or postponing the case to enable the appellant to call a witness by name Kamal Ariffin. Secondly, that the learned trial magistrate was wrong in presuming that under section 114(g) of the Evidence Ordinance that if Kamal Ariffin were called to give evidence his evidence would be unfavourable.

The appellant gave evidence on oath to the effect that the beams were given to him by a contractor named Kamal Ariffin and that he did not steal them from the complainant. In cross-examination he said that Kamal Ariffin had no land near his place and that he took the said beams by the side of a bridge. That was all he said in the court below. Kamal Ariffin was not called as a defence witness and there is no mention in the record that the appellant had asked for an adjournment in order to call that witness.

Section 259(i) of the Criminal Procedure Code gives a magistrate an unfettered discretion to postpone or adjourn a criminal trial where a witness is absent or for any other reasonable cause. Reasonable cause is a term of art for lawyers and no definite ruling can be laid down; each case must be dealt with according to its own peculiar circumstances. It is no doubt an important adjunct to the administration of justice that there will be the least possible delay in trying a criminal case. However, considerations may occur when a postponement or adjournment of a trial becomes desirable, namely, that a witness who has been named by an accused person is absent on the date of trial. It has been held in a similar case that the absence of a witness affords a reasonable cause for adjourning a criminal trial (see *R.* v. *Virasami* (1)). Every latitude must be given to an accused person to defend his case and to call witnesses, more so when the accused person is not represented. In my view, the circumstances of this case warranted an adjournment so that the witness named by the appellant may be called.

With regard to the second ground of appeal, it was said by counsel on behalf of the appellant that the adverse comment made by the learned magistrate amounts to a misdirection which justifies the appeal to be allowed. In the grounds of judgment the learned magistrate said, and I quote:

> "In his defence the accused denied taking those beams from the land of P.W.1 and said that they were given to him by one Kamal Ariffin. He did not call any witness to substantiate his evidence".

Up to that point no criticism can be levelled against the judgment of the learned magistrate. However, the learned magistrate went further to say, and I quote:

> "I think it is not enough for the accused simply to deny taking those beams in order to create a reasonable doubt in the case for the prosecution. Furthermore, if Kamal Ariffin did exist why he did not call him to give evidence for the defence. From this failure I invoked the provision of section 114 illustration (g) of the Evidence Ordinance 1950 and presumed that if he were called to give evidence his evidence would be unfavourable to the accused".

That, to my mind, is a misdirection. It is the duty of the court to consider the defence story which may produce one of three results, namely, that if the court is convinced of the truth of the accused's story or that it created a reasonable doubt as to guilt, then the court must acquit the accused person. Sometimes the defence story strengthens the prosecution case and in that case the court has to find the accused guilty. But it is not the duty of the accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection. In my view, the learned magistrate overlooked the authorities on that point which are afforded by the case of *Goh Ah Yew* v. *Public Prosecutor* [2] and the case of *Abu Bakar* v. *R.*[3] where the comments made by the trial district judge in the latter case is almost similar to the present case. In that case the appellate court said that there is no duty cast upon the defence in a criminal case to call any evidence and no inference unfavourable to him can be drawn. There the learned trial district judge appeared to have drawn an unfavourable inference because the absent witness was not called by the defence. And so in this particular case. If the learned magistrate had not overlooked those two authorities I am sure he would not have misdirected himself on this point.

In the circumstances this appeal is allowed. The conviction and sentence are set aside, and the fine paid by the appellant is to be refunded to him.

Appeal allowed.

Solicitors: *Laycock & Ong.*

TIO CHEE CHUAN v. KHOO SIAK CHIEW & ORS.

[P.C. (Lord Guest, Lord Wilberforce, Lord Pearson) March 2, 1967]

[Privy Council Appeal No. 3 of 1966]

Contract — Service contract — Construction of — Termination of service — Whether justified by special circumstances.

Practice and Procedure — Parties to be sued — Whether respondents were proper — Points not taken in courts below.

The appellant's letter of appointment as a teacher at a salary of $310 per month, dated October 15, 1960, was for four years commencing on January 1, 1961, and expiring on December 31, 1964. The appellant received a letter, dated October 8, 1962, from the acting supervisor and chairman of the education sub-committee stating that his post as teacher at the Sandakan Chinese Secondary School would not be continued from January 8, 1963, and that in pursuance of the terms of his contract with the education sub-committee he was given three month's notice to leave the service. In an action in the High Court in Borneo the appellant claimed that he had been wrongfully dismissed and sought damages. Harley J. held that the appellant had been wrongfully dismissed and awarded damages at a sum equal to $330 a month from the date of his ceasing employment up to the date of judgment and a further $330 a month from that date until his re-employment or December 31, 1964, whichever should be the earlier. The Federal Court reversed that judgment and he appealed to the Judicial Committee of the Privy Council. The official translation of clause 4 of the contract was in the following terms: "The teachers and staff of the school must not during the validity of the agreement of appointment rescind the agreement of appointment except for very important matters. If, in case of special circumstances, release of or withdrawal from the appointment is necessary either party shall give three months' notice in advance". No reasons for the appellant's dismissal were given in the letter of October 8, 1962, but one Tan Tze Shun one of the respondents (respondents' only witness) had said in evidence "we could not keep the plaintiff at $330 anyway because we had too large a ratio of junior teachers". No further elucidation of this point was made in evidence or in argument. In the Federal Court this ground of dismissal was amplified in the judgment of Wylie C.J. by reference to Education (Central Education Fund) (Amendment) Rules, 1963 under which it became necessary to reduce the number of teachers so as not to jeopardise the grant-in-aid under the Rules.

Held: the respondents having failed to justify the appellant's dismissal in terms of clause 4 of the contract, the appeal should be allowed.

Observations on question whether the Board would entertain points not taken in court below.

PRIVY COUNCIL.

J. G. Le Quesne, Q.C. and *Mervyn Heald* for the appellant.

J, Lloyd-Eley for the respondents.

The judgment of their Lordships was delivered by,

Lord Guest: This appeal from the Federal Court of Malaysia concerns the construction of a single clause in a contract between the appellant and the management committee of Sandakan Chinese Secondary School, Sandakan. The appellant's letter of appointment at a salary of $310 per month, dated 15th October 1960 was for four years commencing on 1st January 1961 and expiring on 31st December 1964. The appellant received a letter, dated 8th October 1962 from the acting supervisor and chairman of the education sub-committee stating that his post as teacher at Sandakan Secondary School would not be continued from 8th January 1963 and that in pursuance of the terms of his contract with the education sub-committee he was given three months' notice to leave the service.

The official translation of clause 4 of the contract is in the following terms:

"The teachers and staff of the school must not during the validity of the agreement of appointment rescind the agreement of appointment except for very important matters. If, in case of special circumstances, release of or withdrawal from the appointment is necessary either party shall give three months' notice in advance."

In an action in the High Court in Borneo the appellant claimed that he had been wrongfully dismissed and claimed compensation. Harley J. held that the appellant had been wrongfully dismissed and awarded damages at